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In the Supreme Court

OF THE

United States

October Term, 1933

GRACE LEWIS CONNELL, MERLE C. ADAMS, and MARY ADAMS,
Petitioners,

vs.

EVA S. WALKER,
Respondent.

No.____

RESPONDENT'S BRIEF AND MOTION TO DISMISS PETITION FOR WRIT OF CERTORARI

STATEMENT OF MATTER INVOLVED

The petitioners and respondent were for many years neighbors and friends in North Dakota where the debt, evidenced by note dated November 1st, 1930, for $3500.00, Exhibit "1" Page 56, of the transcript of record, was first incurred by the Petitioner, Grace Lewis Connell, to obtain money to save her farm of

five hundred twenty acres (520), located in Ramsey County, North Dakota, from a mortgage foreclosure.

The debt was renewed from time to time; and in 1930 respondent suggested that the debt should be secured by a mortgage on the land. The Petitioner, Connell, was reluctant to give such a mortgage. She said it had always been understood that the land was to be held by her as security for the debt without a mortgage; that she would pay the debt as fast as the proceeds of the farm would permit and would not sell or mortgage the land without first paying the debt; that they had been friends for many years and she had always kept her word with the respondent and would continue to do so.

About one year later, February 1st, 1931, when again pressed by respondent to secure the debt, she said she owed no other debt and was good for the money; however she would talk the matter over with her son, the petitioner, Merle C. Adams, and advise the respondent of her decision.

On June 12, 1931, petitioner, Connell, gave a Deed to petitioners Merle C. Adams and Mary Adams, his wife, her son and daughter-in-law,

conveying all this property for a consideration stated in the Deed as $10.00. The property was later in Court stipulated to be worth $5000.00.

The note in question, Exhibit "I" not being paid, respondent on December 1, 1931, brought this action in Ramsey County North Dakota, to recover on the note and attached this land, the action being in Rem, no personal service being obtained on the defendants.

In her Complaint the plaintiff, respondent herein, set out the facts of the execution and delivery of the note; its non-payment; that she was the owner thereof; that the defendant, Connell, owned the land in Ramsey County which was later attached; that the indebtedness covered by the note represented money loaned to Connell for the purpose of discharging mortgages thereon; that the transfer on June 12, 1931, was fraudulent and without consideration, and with intent to cheat and defraud her creditors and to hinder and delay them in the collection of their debts. That the Defendants, Adams, accepted and received the said Deed with the knowledge of the fraudulent intent and purpose of the defendant, Connell; that the defendant, Connell, had no

other land or property within the State of North Dakota, or elsewhere, and that said transfer rendered her wholly insolvent.

The plaintiff demanded judgment against defendant Connell for the amount of the note, with interest and costs, and against all the defendants demanding that the transfer of said land be set aside as fraudulent and declared null and void; that the plaintiff had a first and prior lien on and to the said premises. The plaintiff then secured a writ of attachment on the grounds that the defendants were non-residents and the land was duly attached. Service was had on all the defendants by publication and on December 28th, 1931, they served their joint answer upon the plaintiff, verified by the defendant Connell, admitting all the allegations set out and contained in the Complaint excepting only denials of the fraudulent intent of the transfer to hinder and delay any creditor in the collection of a debt; alleging that the transfer was in good faith and for value; admitting that Connell had no other land or property in North Dakota, or elsewhere, upon which the plaintiff could realize her claim, but denied that the transfer of the land ren-

dered the defendant, Connell, insolvent.

On the 29th day of February, 1933, defendant served their joint amended answer wherein they reiterated the allegations, admissions and denials of the original answer, and further alleged that on the 24th day of February, 1932, defendant, Connell, filed her voluntary petition in bankruptcy in the District Court of the United States for the Southern District of California, accompanied by the regular schedules and statement as required by the Bankruptcy Act; and having been duly adjudicated a bankrupt, the defendant demanded that the action be dismissed and that all proceedings therein be stayed until the final disposition of the bankruptcy proceedings.

Thereafter on the 7th day of March, 1931, the defendant filed a motion predicated on the allegations contained in the first amended answer and an affidavit of their counsel, John A. Jorgenson, as to the proceedings in bankruptcy; demanding that all the proceedings in this action be dismissed; that the Trial Court had no jurisdiction and should take judicial notice of the bankruptcy proceedings. The plaintiff resisted the motion and it was denied.

The case came to trial on the issues, the plaintiff offered evidence on her Complaint; the defendant appeared by counsel and obpected to the jurisdiction of the court on the grounds of the bankruptcy proceedings pending and filed the hereinbefore mentioned motion to dismiss Exhibit "A", defendant contending that such adjudication in bankruptcy has been less than four months after the date of the attachment and that therefore the attachment had become null and void, even though the transfer was fraudulent; that the plaintiff was in no position to challenge, or set aside, the transfer. This objection being overruled counsel for defendants participated in the trial, cross examined witnesses but offered no evidence, requesting the Trial Court to take judicial notice of the files and records of the bankruptcy proceedings and ask to obtain permission to present in evidence, a copy of the adjudication and order of reference; counsel then renewed the motion for dismissal.

The trial court adhered to its former ruling on the challenge to the jurisdiction of the Court and validity of the lien of attachment. With the respect to the lien of attachment in this case

he held that the provisions of Section 67F of the Bankruptcy Act could be invoked only by the trustee of the bankrupt or those holding under him.

> "That the attempted recording of the said Deed on July 10, 1931, in the office of the Register of Deeds of Ramsey County, North Dakota, in Book 40 of Deeds, page 448, was a nulity and void for the reason that said instrument was not entitled to record because it did not contain the post-office address or addresses of the grantees therein as required by law.
>
> That such attempted record was, and is, of no force and effect, and that the lien of the plaintiff herein, and to and against said premises, is prior to such Deed and and such attempted recording thereof."
>
> "That the plaintiff was in the position of an innocent purchaser in good faith and for a valuable consideration."

That the transfer of the land in question was without consideration and with intent to defraud the grantors creditors; that the defendants, Adams, had knowledge of the fraud and that therefore the transfer was null and void as against the attaching creditor.

The Trial Court therefore ordered Judgment

that the premises be sold and that the plaintiff be satisfied so far as possible from the proceeds thereof, but that the plaintiff had no general personal judgment against the defendant, Connell. Thereupon the defendant perfected an appeal to the Supreme Court of the State of North Dakota.

The Supreme Court of North Dakota, after a careful review of the proceedings and the evidence, found the facts substantially as herebefore set out and held that the transfer was fraudulent as to the plaintiff; that so far as the records disclose there were no other creditors; that the appellants, Adams, received the Deed without consideration and with knowledge of the fraud; that the evidence amply sustained the trial courts findings in those respects; that the stipulated value of the land was $5000.00. The consideration recited in the Deed was only $10.00, presumptively the only consideration, citing 18 CJ265. That the evidence offered by the plaintiff, was not controverted in any way by the defendants, that, together with the circumstance, that after the instant action was begun the defendant, Connell, became a voluntary bankrupt, amply sustained

the finding of the Trial Court.

That the attachment was effective as against defendant, Connell, thereby the Court acquired jurisdiction so far as Mrs. Connell's interest in the land was concerned and that defendants, Adams, appeared and answered, thus submitting themselves to the jurisdiction of the Court; that the case was tried on its merits and that defendants, Adams, were bound by the judgment.

That there was only a presumption that a trustee was appointed; that the property was not exempt, and the question of the right of the plaintiff to enjoy the fruits of the litigation must be tried as between the plaintiff and the trustee.

That Mrs. Connell having divested herself from all right or title in the property is in no better position than any other stranger to the title; That defendants, Adams, can have no complaint, they are not among those the Bankruptcy Act was intended to benefit and cannot object if the plaintiff in this action enjoys a preference over other creditors. They paid no consideration for the property and were charged with notice of the fraud.

That the defendants motion for dismissal of the action because of the pending bankruptcy proceedings was properly denied, and the objections predicated upon that ground were likewise correctly overruled. That the Trial Court correctly held that the attachment was valid and effective as against Mrs. Connell to the same extent that it would have been had it been fixed more than four months prior to her adjudiation in bankruptcy and that the plaintiffs claim should be, by reason and to the extent of such lien, be satisfied out of the property.

REASON WHY PETITIONS SHOULD BE DISMISSED

It must be remembered that the actual motion ruled on by the trial court at the trial was for an out right dismissal. (Page 51 and page 55 of the Records). The motion of Mr. Anderson for the defendants, after the plaintiff rested was for dismissal, not for a stay of proceedings, page 75 of Record).

True, Counsel had asked for a stay as a part of the prayer of the First Amended Answer

and also filed a Notice of Intention to file a motion to Stay but the actual motion filed at trials was, with the first supporting evidence offered, not for a stay, but dismissal; no other motions were filed.

Any motion for either a peremptory or discretionary stay of an action in State Court would have to allege:

1.—That the suit was based on a claim that was dischargable in bankruptcy. 7 CJ 350.

2.—That a petition in bankruptcy had been filed. The motion for peremptory stay must be based on those grounds and the further ground that the adjudication and reference had not been made and had not been dismissed.

A motion for discretionary stay must allege the adjudication and reference.

3.—That the debt is dischargable in bankruptcy.

4.—That the petitioner had been discharged or ~~and~~ Had made application for discharge which was pending.

The Petitioner herein did not comply, either in their First Amended Answer, or in the Motion for dismissal with any of these necessary

requirements, State vs Broadhus, 234 Mo. 358, 137, SW 268.

Mere statements of defendants counsel can not operate as a stay of proceedings.

McGowan v. Bowman, 79 Vt. 295; Atl., 1121.

To grant a hearing on this petition would defeat the whole purpose of the Bankruptcy act. The Petitioner had plenty of remedies below if he could have Predicated his motion on sufficient grounds for stay or dismissal. On the record he was not entitled as a right to a stay or a dismissal. Rodges v. Abbot 92 N. E. 472.

Johnson v. Waxelbaum & Co., 1 Ga., A 511, 58 S. E. 56; McGowan v. Bowman, 79 Vt., 295—64 A. 1121.

Defendant and petitioner, Grace Lewis Connell, gave a Warranty Deed to the premises attached, on June 12, 1931, Exhibit "2", page 57 of the record, whereby and wherein she granted bargained, sold and conveyed the tract of land which is the subject matter of this action. In her verified Answer, paragraph 4, she alleges that the said transaction was made in good faith. There is no record of any transfer of this property back to Mrs. Connell. True, this Deed was not entitled to record and the

courts have found that it was an attempted fraud on this plaintiff creditor but this would not give Mrs. Connell an equitable right to profit by her own wrong, and claim interest in the property for herself or for any other person except perhaps her original grantee.

In her First Amended Answer she alleged she had surrendred to the Bankruptcy Court, any right or title she had to this land on February 24th, 1932, more than four months after the said Warranty Deed was given. She did not have any right or title to surrender voluntarily, nor could she have recovered any by an action in her own name, and there is a question whether or not a trustee, if one had been appointed, could have recovered more than four months after the transfer under the rules of the Bankruptcy Act.

We must assume in view of the above facts that the alleged trustee, if there was one appointed if he considered he had any rights worth protecting would have filed in the office of Register of Deeds of Ramsey County, North Dakota, a notice of his claim as required by Section 47C of the Bankruptcy Act, and intervened in the pending action to set aside the

transfer as a fraud on all the Creditors.

Defendant, Adams, could have had no interest in the bankruptcy proceedings in any event. Their rights depended on a Deed given more than four months before the proceedings and if a trustee had been appointed and cared to intervene he could have done so by introducing in evidence, a copy of his appointment and of Schedule "B" (4) showing his interest in the property, none of which was done. It is upon such vague and uncertain interest that these petitioners rest their right of review.

The question might well be asked "who would be benefitted if it were granted". Connell would lose anything she might gain to her grantee (Adams) as an after acquired title and he could not benefit by his grantors bankruptcy, nor by his failure to record his Deed, fraudulently obtained, prior to the attachment proceedings, and we have no trustee.

ARGUMENT.

The record of the bankruptcy proceedings were too uncertain to support a motion to dismiss this action, even if it should be conceded that any person, other than the Trustee, was entitled to such relief.

There was no evidence of the appointment of of a trustee, no evidence that the North Dakota property was listed in the schedules; no evidence that the respondents, claims was listed among the debts. There is nothing but a copy of the Adjudication and Reference.

True, there is an allegation in the First Amended Answer and the Affidavit of Counsel in support of motion which are a part of the proceedings but no evidence whatsoever. If there had been such proceedings we believe Counsel would not have overlooked filing copies when they asked for a stipulation to permit the introduction of the Order of Adjudication, (page 1 of the Record.) We must take the record as it is and must assume the bankruptcy proceedings went no further than the Order and Reference, in that case, if petitioner could get this action dismissed she would still be the record owner of the land, free from her debts, assuming that her deed to her son would convey to him her after acquired title they would have accomplished their purpose and have defeated the whole object of the Bankruptcy Act. As we view it the law cited by the petitioner is not in point until they have first laid a founda-

tion and actually established by competent evidence the status of the bankruptcy proceedings and no doubt the Trial Court would have given them plenty of time to secure such evidence if they would have asked for a stay for the purpose of securing additional evidence but they did not ask for a stay for that purpose, but for a dismissal.

The Trial Court and Supreme Court of North Dakota having especially noted the "badges of fraud" in Mrs. Connell's statement to Morris; her subsequent Deed to her son and the conflict of her verified allegations in her first answer and first amended answer, would naturally require good proof that the bankruptcy procedings were instituted in good faith and the failure of the Plaintiffs to furnish such proof is the best argument for the courts overruling the motion to dismiss.

The Trial Court would, in any event, hesitate to dismiss the action to set aside a fraudulent transfer until the trustee had an opportunity to appear and intervene, since setting aside a fraudulent transfer would be for the benefit of the Bankrupt estate and for the benefit of the creditors and the fruit of the action could

await further proceedings before being awarded. In fact we believe that the judgment of the trial court and the opinion of the Supreme Court are well founded on the evidence and in strict accord with the law and the rules of the Courts of Equity and who is in a position to come into court with clean hands and complain.

There can be no disputing the rights of an innocent purchaser for value to have obtained a perfectly good title to this property from Defendant, Connell, until some instrument had been filed for record in the office of the Register of Deeds, in Ramsey County, North Dakota, where instruments effecting the title of land, involved in this action, must be filed and recorded, giving notice of other claims to the title; Sec. 5594, Compiled Laws, North Dakota, 1913.

> "It is not the actual interest in the state that is thus liened by attachment but interest that is shown by the records of the Register of Deeds office."

"Under the statute and holding of this Court the attaching creditor is a purchaser in good faith as the date of the attachment _____

if the law makes the previous transfer void as to the creditors there is no transfer at all and the record title to the property remains in the debtor. (Mott vs. Holbrook, 28, N. D., page 25)."

Under the laws of the State of North Dakota and the ruling of its Courts; until some instrument is filed in the place for recording transfers of this land the legal title remains in the Defendant, Grace Lewis Connell, by reason of the Deed to her son not being entitled to record, and this attaching creditor is in the same position as an innocent purchaser for value until a better title is established by the filing of some other instrument, either as a transfer or notice of a claim; filing of such a notice as is required by the bankruptcy act on the part of the trustee.

This property was attached, sold by order of the court, and the Sheriff's Certificate of Sale has matured into a Deed and the land is now owned by subsequent purchasers in good faith and for a valuable consideration whose record title is perfectly clear.

Grace Lewis Connell got this money in good faith to save her farm from mortgagees; she

admits it, and we can not believe that such a transparent effort to use the bankruptcy courts for the purpose of fraud can succeed.

We contend that citations referring to rights of a trustee or of a bankrupt over his exempt property set over by the bankruptcy court, are not in point for the reason that there is no trustee and this is not exempt property.

We also contend that citations based on the theory of insolvency of the petitioner in bankruptcy, at the time of attachment was procured, are not in point and can not be raised by petitioners herein, since they have already alleged by verified answer that Grace Lewis Connell was not insolvent when the attachment was made. They have no other right from the record, than any other stranger to the record.

The following citations are respectfully submitted.

As to effect of 67 F of the Bankruptcy Act:

27 C. J. 474 and 727 et seq. and notes.

Union National Bank v. Oium 3 N. D. 193, 54 N. W. 1034, 44 A. S. R. 533

Also Ellis v. Fiske 60 N. D. 142, 232 N. W. 891 71 A. L. R. 501 and cases cited therein.

Neugent Garment Company v. U. S. Fidelity & Guaranty Co., 231 NW 600 and 230 N. W. 69

Swaney v. Hasara, 164 Minn., 416; 205 N. W. 274.

Miller v. Barto, 247 Ill., 104, 93 N. E. 140.

Rochester Lumber Co. v. Locke, 72 N. H. 22, 54 Atl., 705, 7 C. J. 197 and cases cited.

Matrin v. Green, et al, 166 Minn., 208, NW 21, Black on Bankruptcy Section 935.

Recovery of Land Transferred:

Sec. 72 (E) Bankruptcy Act.

As to No Claims by Trustee:

Straton v. New, 283 U. S. 318, 75 L. ed 1060 and note;

Simons v. Wells, Receiver CCA No. 6980 June 5, 1933

See also Isaac v. Hobbs Tie & Rubber Company, 282 U. S. 734, 75 L. ed. 645 and note

RCL 3-252.

As to Plft. Prima Facia case:

Peck v. Peck, 212, 872 (T. I.)

As to Connells Deed not being entitled to record and rgihts of attaching creditors:

Sec. 5594 Compiled Laws of North Dakota, 1913

Chapter 249, pg. 351, Session Laws 1929

Donovan v. St. Anthony & Dakota Elevator Co., 8 N. D., 585

First Natl. Bank v. Casselton Realty & Investment Co., 44 N. D., 353

Goss v. Herman, 20 N. D., 295, 127 NW 78

McCoy v. Davis, 38 N. D., 328, 164 NW 951

Donahue v. Kohler McLister, et al, 254 Pac 989.

As to the attempted fraud by parent & son:

Jones v. Flatters, 54 N. D., 459

Peck v. Peck, 212 NW (S. D.) 872

27 C. J. 486-989-493-494-495

18 C. J. 265-266

Jurisdiction of the Court:

Secs. 69E-72G. 23E Sec. 62 (b) Bankruptcy Act.

RCL 3-185-186

160 Fed. 903, 101 Fed. 248, 28 Minn., 414, 20 Minn., 81.

The only specification of error, or the only reason given by the petition for a writ of Certiorari herein, is because the lower court denied a motio nfor stay of proceedings. We find, however, that the motion made was not a motion for a stay but a motion to dismiss. The lower court could not have erred in denying a motion to stay when no such motion was pre-

sented, and the petition of this petitioner herein must fail.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied and judgment of the Supreme Court of North Dakota be sustained.